No. 48147-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EUAL DAVIS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

---

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Washington Statutes

Constitutional Provisions

Other Rules or Authorities

I. ISSUES

A. Did the trial court err when it admitted the methamphetamine pipe because the State did not adequately establish the chain of custody for the pipe?

B. Did the State sufficiently prove beyond a reasonable doubt all of the elements of Possession of Methamphetamine?

C. Did the trial court err when it admitted Davis' statements that he made to the Walmart asset prevention associate without being properly advised of his *Miranda* warnings because the associate was actually an agent of the state?

II. STATEMENT OF THE CASE

Around 11:00 p.m. on March 20, 2015, Kyle Ringeisen, who works for the asset protection department at the Chehalis Walmart store, spotted Davis in the electronics department. RP 11-12. Davis was fiddling with the packaging of watch batteries. RP 12-13. Davis appeared to have small, black item in his hands and it looked like he was opening the battery packaging, so Mr. Ringeisen began watching Davis. RP 13; CP 23.

Mr. Ringeisen spent approximately an hour watching Davis. RP 13. Davis spent more time in electronics, where he appeared to check out some other items. RP 13. Davis next headed to sporting goods, where they also have small watch batteries, and opened some more packaging with the small item in his hand. RP 13; CP

23. Next Davis cut a flashlight off one of Walmart's security locking pegs. RP 14.

Pursuant to Walmart policy, because Davis had a sharp implement, probably a knife, Mr. Ringeisen decided to call law enforcement. RP 15-16; CP 23. Davis had already concealed the flashlight in the front waistband of his pants. RP 16; CP 23. Mr. Ringeisen maintained sight of Davis at all times until Sergeant McNamara from the Chehalis Police Department arrived. RP 16, 19, 53. Mr. Ringeisen pointed out Davis to Sergeant McNamara. RP 18.

Sergeant McNamara contacted Davis, told Davis they had reason to believe Davis had been shoplifting and they needed to speak to him. RP 18; CP 23. Davis was handcuffed and escorted up to Mr. Ringeisen's office, which is located inside the Walmart store. RP 18-19. Mr. Ringeisen told Sergeant McNamara what he had observed. RP 19. Sergeant McNamara conducted a search of Davis and Mr. Ringeisen observed the search and let Sergeant McNamara know what should be located on Davis. RP 19-20. Sergeant McNamara was able to recover the flashlight that was concealed and four or five different watch batteries that were in Davis' pockets, as well as a pocket knife and a pipe. RP 20; CP 23.

The pipe was dark blue in color. RP 58-59. Sergeant McNamara gave the pipe to Officer Bailey to field test it. RP 60.

Mr. Ringeisen asked Davis questions and got a statement from him RP 20-21. Davis explained to Mr. Ringeisen that times were tough, he did not have any money, he needed the batteries for the sight for his gun and he wanted a cool flashlight. RP 32; CP 23. Davis said the pipe was not his, that he had found it at the store along with a lighter, that he had picked up to keep a child from finding it. RP 68. The total cost of the stolen items was $59.97. RP 36.

The State charged Davis with Count I, VUCSA: Possession of a Controlled Substance [Methamphetamine] and Count II, Theft in the Third Degree. CP 1-2. Davis elected to have his case tried to the bench sitting without a jury. RP 4-5; CP 13. The trial judge found Davis guilty as charged. CP 24. Davis was sentenced to 30 days in jail, or in the alternative electronic home monitoring. CP 26-37. Davis timely appeals his conviction. CP 38.

The State will further supplement the facts in the argument section below.

III. ARGUMENT

A. THERE WAS NO CHAIN OF CUSTODY ISSUE IN THIS CASE. DAVIS' ARGUMENT REGARDING A BREAK IN THE CHAIN OF CUSTODY GOES TO THE WEIGHT OF THE EVIDENCE, NOT ITS ADMISSIBILITY.

Davis argues at length that the State did not sufficiently satisfy the requirements for the chain of custody to admit Exhibit 4, the pipe which contained the methamphetamine. Brief of Appellant 6-13. Davis even argues he properly objected to the admission of both Exhibit 4, the pipe and Exhibit 5, the lab report, on the basis of incomplete chain of custody.[1] The State sufficiently satisfied the chain of custody for the items it asked the trial court to admit and any issue regarding chain of custody goes to weight, not the admissibility of evidence. The trial court did not abuse its discretion when it admitted Exhibit 4, the pipe containing the methamphetamine.

1. Standard of Review.

A determination regarding the admissibility of evidence by the trial court is reviewed under an abuse of discretion standard. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012); *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations

[1] The State will be filing a supplemental designation of Clerk's papers designating Exhibit 5, the Stipulation and Lab report.

omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 688, 701, 940 P.2d 1239 (1997).

2. The State Sufficiently Satisfied The Chain Of Custody Requirement For The Pipe And Any Issue Goes To The Weight Of The Evidence, Not Its Admissibility.

A party can sufficiently establish chain of custody to satisfy the foundational requirement to admit an exhibit even absent proof of an unbroken chain of custody. *State v. Picard*, 90 Wn. App. 890, 897, 921 P.2d 336 (1998). The object must be satisfactorily identified and there must be evidence that it is in substantially the same condition as it was when it was collected. *Picard*, 90 Wn. App. at 897. It is not required to have every single person who has ever laid hands on the evidence be called to establish the chain of custody. *State v. Lui*, 179 Wn.2d 457, 481, 315 P.3d 493 (2014), *citing Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S. Ct. 2527, 174 L. Ed. 2d 314, 327 (2009).

As the Supreme Court stated in *State v. Campbell*:

> The jury [,or judge,] is free to disregard evidence upon its finding that the article was not properly identified or there has been a change in its character. However, minor discrepancies or uncertainty on the part of the

> witness will affect only the weight of evidence, not its admissibility.

State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Davis argues the trial court abused its discretion when it admitted into evidence the pipe as the State did not sufficiently establish the chain of custody. Brief of Appellant. 10-13. Davis insists Sergeant McNamara's testimony regarding the procedures for evidentiary items was not sufficient and without Officer Bailey or anyone from the crime laboratory called to testify regarding how the pipe traveled from each location and its condition, the chain of custody testimony lacks many links in the chain, thereby one cannot reliably believe the pipe is the same one recovered from Davis. *Id.* Davis ignores much of the testimony that was given, which sufficiently established chain of custody.

Sergeant McNamara testified he found a dark blue glass pipe in Davis' pants pocket. RP 58. Sergeant McNamara positively identified the pipe in Identification 4, later admitted as Exhibit 4, as the pipe he found in Davis' pocket. RP 58. Sergeant McNamara noted that the pipe was not broken when he located it in Davis' pocket, but to his understanding it came back from the lab broken. RP 58. The State moved to admit Identification 4, Davis' trial counsel objected, citing foundation, which was sustained. RP 59.

Sergeant McNamara explained after he retrieved the pipe out of Davis' pocket he handed the pipe over to Officer Bailey to perform a field test on the pipe. RP 59-60. Sergeant McNamara then explained the protocols the Chehalis Police Department has in regards to the handling of evidence. RP 60. Evidence is logged into the evidence log at the Chehalis Police Department, and Exhibit 4 was logged into the evidence log at the Chehalis Police Department. RP 61. Sergeant McNamara explained the procedure for logging items into the evidence locker. RP 61-62. The officer must fill out the entire top portion of the item, they put in a chain of custody report, which says, from and to and the date and they fill out an actual evidence sheet as well. RP 62. Officer Bailey's badge number is on Exhibit 4. RP 62. The incident number, which is a unique number for each investigation, for this case is also on the item. RP 62-63. Officer Bailey's name is also on the package. RP 63. The package is then sealed and goes into a temporary evidence locker that is locked. RP 62.

Sergeant McNamara can tell the item was sent to the Washington State Patrol (WSP) Crime Laboratory because there is a sticker on the on packaging indicating that WSP has had the item. RP 63-64. The crime laboratory has its own identification number

and that is on the item. RP 64. The State admitted Exhibit 5, contrary to Davis' assertion on appeal, without objection. RP 64. Sergeant McNamara explained that the laboratory number on Exhibit 4 and Exhibit 5 matched. RP 64.

When asked again, by the judge, if the pipe was the one he took from Davis, Sergeant McNamara stated it was. RP 67. The trial court then ruled that the pipe was admissible and admitted Exhibit 4. RP 68. The trial court did not abuse its discretion when it made this determination.

Contrary to Davis' contention that he objected to both the admission of the pipe and the lab report, Davis did not object to the admission of the lab report. Brief of Appellant 10. When the State offered Exhibit 5, the stipulation and the lab report, Davis did not object. RP 64. Davis argues *State v. Roche* and *State v. Neal* support his argument that the trial court abused its discretion when it admitted Exhibit 4, the pipe, over his objection for lack of foundation for failing to establish the chain of custody. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001); *State v. Roche*, 114 Wn. App. 424, 59 P.3d 682 (2002). Both cases are distinguishable from Davis' case, as the chain of custody issue was not the main issue in either case, but an auxiliary discussion.

In *Neal* the Supreme Court was focused on the admission of the certified document of the lab tests, under the CrR 6.13(b) exception to hearsay. *Neal*, 144 Wn.2d at 605-08. It was determined that CrR 6.13(b) did not violate a defendant's right to confrontation. *Id.* at 608. The Court also briefly discussed that the lab report did "double duty" as it also discussed the chain of custody for the evidence. *Id.* at 607. In Davis' case the lab report is not at issue, as he stipulated to it and did not object to its admission.

Similarly, *Roche* is also distinguishable. *Roche* is a case where the forensic scientist was stealing portions of the drugs he was testing and diverting them for his personal use, which he was partaking in while working. *Roche*, 114 Wn. App. at 428-31. This Court did caution that when evidence is not as readily identifiable and is susceptible to tampering or altercation, it is more customary to have each person in the chain of custody testify. *Id.* at 436. There were several factors this Court stated should be considered in regards to whether the more stringent chain of custody test is necessary, "[f]actors to be considered include the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration." *Id.* at 436. This Court

acknowledged, "The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution." *Id.*, citing *Campbell*, 103 Wn.2d at 21. This Court, as it has before and since, held to the principle that discrepancies or uncertainties go to weight not admissibility. *Id.*

The chain of custody issues in *Roche* had to do with the fact that the forensic scientists' credibility was completely devastated due to his malfeasance. *Id.* at 437. This Court reasoned that due to the scientist's sloppy work, dishonesty and drug use, the jury could have called into question not only his testing of the drugs but also his preservation of the chain of custody. *Id.* There is no such issue in Davis' case. There has been no allegation of any malfeasance towards any member who had custody of the pipe, whether that be Sergeant McNamara, Officer Bailey, the Chehalis evidence custodian or Deborah Price, the forensic scientist or evidence custodian, Marion Brown. See Ex. 5. *Roche* does not apply to Davis' case.

The trial court did not abuse its discretion when it admitted the pipe into evidence. The decision was not made on untenable or manifestly unreasonable grounds. The trial court heard the practices at the Chehalis Police Department. Sergeant McNamara

positively identified the pipe, Exhibit 4, as the one he located in Davis' pocket. Sergeant McNamara explained that the pipe was in substantially the same condition, except it was broken. Further Sergeant McNamara showed how the numbers and names that were affixed to the packaging of the pipe lined up with Davis' case and also how the pipe also had a number on it that corresponded with the crime lab. The trial court's admission of the pipe was within its power to admit evidence and this Court should affirm that decision and Davis' convictions.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JUDGE'S FINDING THAT DAVIS POSSESSED METHAMPHETAMINE.

Davis argues the State did not present sufficient evidence to sustain the judge's finding of guilt. Brief of Appellant 13-15. Davis asserts that his testimony put forth a successful unwitting possession defense to the charge of Possession of Methamphetamine and therefore the State did not meet its burden. The State presented sufficient evidence to sustain the judge's guilty verdict.

1. Standard Of Review.

Sufficiency of evidence following a bench trial is reviewed for "whether substantial evidence supports the challenged findings of

fact and whether the findings support the trial court's conclusions of law." *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citation omitted). Unchallenged findings are verities on appeal. *State v. Lohr,* 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

Davis assigns error to Finding of Fact 1.11, that the residue was clearly visible in the glass pipe retrieved from Davis. Brief of Appellant 1. Davis also assigns error to part of Finding of Fact 1.14, that the residue from the pipe was sent to WSP. *Id.*

2. The State Presented Sufficient Evidence To Sustain Davis' Conviction For Possession of Methamphetamine.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as

reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

"Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the findings are true." *Smith*, 185 Wn. App. at 956 (citation omitted). The reviewing court defers to the trier of fact on issues regarding witness credibility, conflicting testimony and persuasiveness of the evidence presented. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To convict a person with possession of a controlled substance the State must prove that the person, in this case Davis, possessed a controlled substance, and specify what the substance is. RCW 69.50.4013; WPIC 50.01; WPIC 50.02. Knowledge is not an element of the crime of possession of a controlled substance. *State v. Bradshaw,* 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004).

A defendant may raise an unwitting possession defense, which requires the defendant to show, by a preponderance of the evidence, that he or she did knowingly possess the controlled substance. *Bradshaw*, 152 Wn.2d at 538; WPIC 52.01. The finder of fact (jury or judge) must evaluate the defendant's unwitting possession claim considering all of the evidence that was presented, regardless to who offered the evidence. State v. *Olinger*,

130 Wn. App. 22, 26, 121 P.3d 724 (2005). The ability to raise an unwitting possession defense lessens the harshness of the strict liability crime. *Bradshaw*, 152 Wn.2d at 538.

The methamphetamine in this case came from the residue material left inside of a glass pipe that was located inside of right pants pocket of Davis. RP 58-59; Ex. 5. Davis told Sergeant McNamara that the pipe did not belong to him. RP 68. Davis said "he picked it up to keep a child from finding it." RP 68. Davis testified during direct examination that he found the pipe by the back restrooms at Walmart. RP 85. Davis was asked why he put it in his pocket and he replied, "It was purple or a dark blue in color, and I thought it was cool, with a lighter and I was gonna - - I grabbed it." RP 85. Davis knew it was a pipe, but denied knowing it contained methamphetamine. RP 85. Then Davis said, "I was going to give it to the proper authority or throw it away." RP 86. Davis acknowledged he knew how to use the pipe. RP 87-88.

Davis argues he must establish "some evidence" that he did not know he possessed methamphetamine and he did so by presenting uncontroverted evidence. Brief of Appellant 14-15. Davis must prove by a preponderance of the evidence that he did not know he possessed methamphetamine. That is the standard. Davis

has not done that. Yes, he presented uncontroverted evidence that he did not know it was methamphetamine, through his own testimony, by stating he did not know the pipe contained drugs. Davis also presented a fantastic story of finding the pipe at Walmart, picking it up to protect children and planning on giving it over to the proper authorities.

Davis' story is fantastic because Davis testified he picked up the pipe because he thought it was "cool." Then Davis said he was going to throw it away or give it to the proper authorities. Yet, there were presumably garbage cans in the bathrooms, which were right next to where Davis supposedly found this pipe. When he is arrested, he speaks to Mr. Ringeisen and does not mention the pipe, nor does he mention it to Sergeant McNamara prior to his search. Further, on cross-examination, the State had Davis look at the pipe and Davis said, "Oh, yes. I do see some white residue." RP 88.

The trial judge is the sole determiner of credibility and this Court does not engage in credibility determinations on review. *Thomas*, 150 Wn.2d at 874-75. The trial judge is not required to find Davis credible or his version of the story to be true. The State does not necessarily have to put up evidence, in the way of

contradictory testimony, to overcome the testimony by Davis that his possession of the methamphetamine was unwitting. Davis' explanations as to why he picked up the pipe were contradictory. One reason, because it was cool, but then, as if he thought better of it, Davis explains he picked up the pipe so a child would not get a hold of it. It is late at night. Davis could have easily alerted someone at Walmart that there was drug paraphernalia near their restrooms in the back of the store. Then Davis said he was going to give the pipe to the proper authorities or throw it out. If Davis wanted to stop the pipe from getting in the wrong hands and was going to throw it out, why did he not just do that when he first picked the pipe up? The judge necessarily looked at all of these issues and found Davis to be not credible.

Davis did not prove his affirmative defense by a preponderance of the evidence, therefore the State proved that Davis was in possession of methamphetamine. There was sufficient evidence presented to sustain the trial judge's finding of guilty and this Court should affirm the conviction.

C. THE TRIAL COURT PROPERLY RULED THAT DAVIS' STATEMENTS TO MR. RINGEISEN WERE ADMISSIBLE.

Davis argues that Mr. Ringeisen was acting as an agent for the State and any statements he made to Mr. Ringeisen, prior to

being advised *Miranda*, should have been inadmissible. Brief of Appellant. 15-21. The trial court correctly ruled that Mr. Ringeisen was not a State agent, but an independent employee of Walmart conducting a parallel investigation and Davis' statements to Mr. Ringeisen were properly admitted. This Court should affirm.

1. Standard Of Review.

The ultimate determination of whether a defendant underwent a custodial interrogation is one of law and is reviewed de novo. *State v. Lorenz,* 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

2. The Trial Court Correctly Ruled That Davis' Statements To Mr. Ringeisen Were Admissible, As They Were Not Subject To The Requirements Of *Miranda* Because Mr. Ringeisen Was Not A State Agent.

The Fifth Amendment[2] right to counsel attaches when a person is subject to (1) custodial (2) interrogation (3) by a state agent. *State v. Templeton*, 148 Wn.2d 193, 207-8, 59 P.3d 632 (2002); *State v. Post*, 118 Wn.2d 596, 605-6, 826 P.2d 172 (1992). The *Miranda*[3] rule only applies when a state agent interrogates a person who is in custody:

A suspect's Fifth Amendment privilege against self-incrimination and the corresponding right to be informed attaches

[2] U.S. Const., amend. V

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

when "custodial interrogation" begins. A "custodial interrogation" which requires law enforcement officers to administer *Miranda* warnings to a suspect is defined as questioning initiated by the officers after a person is taken into custody. Generally, in defining custody the Supreme Court has looked at the circumstances surrounding the interrogation and whether a reasonable person would have felt that person was not at liberty to terminate interrogation and leave. *Templeton*, 148 Wn.2d at 208 (footnotes omitted); *see also Miranda v. Arizona,* 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 694 (1966)[4].

The Court developed *Miranda* warnings to ensure that while a defendant is in the coercive environment of police custody his or her right not to make incriminating confessions is protected. *State v. Harris,* 106 Wn.2d 784, 789, 725 P.2d 975 (1986), *cert. denied,* 480 U.S. 940, 107 S. Ct. 1592, 94 L.Ed.2d 781 (1987). A person cannot invoke their Fifth Amendment right to counsel if that person is not in custody. *State v. Warness*, 77 Wn. App. 636, 641, 893 P.2d 665 (1995).

[4] "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

A police officer does not seize a person by simply striking up a conversation or asking questions. *Florida v. Bostik*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed.2d 389 (1991); *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). Nor is there a seizure where the conversation between citizen and officer is freely and voluntarily conducted. *State v. Mennegar*, 114 Wn.2d at 310. Where an officer commands a person to halt or demands information from the person, a seizure occurs. *State v. O'Neill*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003). But, no seizure occurs where an officer approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away. *Id.* at 577-8. Additionally, Washington courts agree that a routine *Terry*[5] stop is not custodial for the purposes of *Miranda*. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

When determining whether *Miranda* warnings are required, the United States Supreme Court ruled that an officer's unarticulated plan to detain or arrest a suspect is irrelevant; the only relevant inquiry is how a reasonable person in the suspect's position would have understood the situation. *Berkemar v. McCarty*,

[5] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

468 U.S. 420, 442, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984). The Washington State Supreme Court specifically rejected the contention that police must inform a suspect of *Miranda* warnings once probable cause to arrest exists, adopting the *Berkemer* test in *State v. Harris.*[6] *See also State v. Short*, 113 Wn.2d 35, 40-41, 775 P. 2d 458 (1989)[7]; *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787 (1992)[8]; *State v. D.R.*, 84 Wn. App. 832, 836, 930 P.2d 350 (1997).

Davis argues that once he was handcuffed and taken into the loss prevention room at the Walmart, Mr. Ringeisen became a state agent when he began to question Davis about the theft because Mr. Ringeisen was working in concert with Sergeant McNamara. Brief of Appellant 19-21. Davis distinguishes his case from *State v. Valpredo*, arguing that in *Valpredo* the person questioning was a shopkeeper, not a loss prevention specialist and the shopkeeper gave partial *Miranda* warnings. *Id.* at 19-20, citing *State v. Valpredo*, 75 Wn.2d 368, 450 P.2d 979 (1969). Davis argues a reasonable person would believe Mr. Ringeisen was an

---

[6] *State v. Harris,* 106 Wn.2d at 789-90.

[7] The existence of probable cause is not a factor to be considered in the determination of custody; the sole inquiry has become whether the suspect reasonably supposed his freedom of action was curtailed.

[8] Probable cause to arrest does not give rise to *Miranda* requirements; the existence of probable cause to arrest has no bearing on whether a suspect is in custody at the time he or she makes any statement to law enforcement officers.

agent of the State and cites to *State v. Heritage* to support the position that this belief requires *Miranda* to be given. *Id.* at 21, *citing State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004). Davis' application of what constitutes a state agent stretches the bounds of *Heritage* to an unrecognizable level. There was no requirement for *Miranda* to be given here and Davis' statements to Mr. Ringeisen were properly admitted.

While the State does not dispute that Davis would be considered in custody and the questions would count as interrogation, Mr. Ringeisen was not a state agent, and therefore *Miranda* was not required prior to questioning by Mr. Ringeisen. *Heritage*, 152 Wn.2d at 347. In *Valpredo*, the Supreme Court found that a shopkeeper was not required to give *Miranda* when he apprehended and questioned a shoplifter. *Valpredo*, 75 Wn.2d at 370-72.

While the United States Supreme Court did find that the Fifth Amendment privilege does attach in cases where a defendant is ordered to undergo a psychiatric evaluation to determine competency where the defendant's statements from that evaluation was later used in a penalty phase of his trial. *Estelle v. Smith*, 451 U.S. 454, 465-69, 101 S. Ct. 1866; 68 L. Ed. 2d 359 (1981). In

Estelle the Court stated,

> When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on crucial issue of the respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.

Estelle, 451 U.S. at 467. The Court went on to discuss how the defendant was not informed that this **compulsory** examination would be used against him. *Id.* (emphasis added).

In *Heritage* the Washington State Supreme Court discussed what makes someone a state agent. The Court reiterated that, "It is likely any state employee who is conducting a custodial interrogation would probably qualify as a state agent for *Miranda* purposes." *Heritage*, 152 Wn.2d at 216 (internal quotations and citations omitted). Further, requiring *Miranda* to be given by broader class of **government employees** is consistent with the precedent in other jurisdictions. *Id. (*emphasis added).

In *Heritage* the government employees at question were city employed security guards, who wore bullet proof vests, security badges and a duty belt, complete with pepper spray, a collapsible baton, radio and handcuffs. *Id.* at 217. These security officers obviously appeared as law enforcement officers to a reasonable

person and a suspect could reasonably believe that the security officer had authority over him or her. *Id.* Therefore, the Court found that such a security guard would be a state agent for *Miranda* purposes. *Id.*

In the present case Mr. Ringeisen was not acting as a state agent, and therefore he was not required to give Davis *Miranda* before questioning Davis about the shoplifting incident. Mr. Ringeisen is not an employee of the State, but rather an asset prevention associate for Walmart, a store employee. RP 11. In the loss prevention office, after Sergeant McNamara had handcuffed Davis and searched his pockets, Mr. Ringeisen asked Davis questions in attempt to get a statement from Davis for Walmart. RP 20, 24. Mr. Ringeisen explained that he asks these questions for his own purposes because he does not know what a person is going to say down the road and he has to explain why that person is in his office. RP 24. Sergeant McNamara did not ask Mr. Ringeisen to question Davis nor did Sergeant McNamara suggest any questions for Mr. Ringeisen to ask Davis. RP 22-24. Mr. Rigneisen did not ask for permission to speak to Davis. RP 22. As Sergeant McNamara explained it, Mr. Ringeisen was doing his thing, it was Walmart's stuff and their paperwork. RP 69.This is not

the actions of an agent of the state. *Miranda* was not required and Davis' statements to Mr. Ringeisen were properly admitted by the trial court. This Court should affirm Davis' convictions.

IV. CONCLUSION

The State adequately established chain of custody for the admission of the pipe containing methamphetamine and any issue with the chain of custody goes to weight not admissibility of the evidence. The State sufficiently proved all the elements of Possession of Methamphetamine beyond a reasonable doubt. Finally, the asset prevention associate was not a state agent and therefore, the trial court did not err when it denied the motion to suppress Davis' statement to the associate. This Court should affirm Davis' convictions.

RESPECTFULLY submitted this 25th day of February, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. EUAL DAVIS, Appellant.	No. 48147-2-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 26, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email address: Liseellnerlaw@comcast.net.

DATED this 26th day of February, 2016, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

February 26, 2016 - 8:54 AM

Transmittal Letter

Document Uploaded: 7-481472-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 48147-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

liseellnerlaw@comcast.net